



KOREMATSU v. UNITED STATES
SUPREME COURT OF THE UNITED STATES
323 U.S. 214
December 18, 1944
[6 - 3]

THIS CASE WOULD LIKELY BE ON MOST EVERYONE’S SHORT LIST OF THE “WORST OF THE WORST.” THAT IS, PERHAPS, UNLESS YOU “LIVED IT.”

OPINION: Justice Black...[Mr. Korematsu], **an American citizen of Japanese descent**, was convicted...for remaining in San Leandro, California, a "Military Area," contrary to **Civilian Exclusion Order No. 34** of the Commanding General of the Western Command, U.S. Army, **which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States.** The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari...

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress...which provides that

" . . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066. That order, issued after we were at war with Japan, declared that "**the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . .**"

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to **remain in their residences from 8 p.m. to 6 a.m.** As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, 320 U.S. 81, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent **espionage and sabotage** in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. **Nothing short of apprehension by the proper military authorities of the gravest**

imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, "...we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken..."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry **refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor**, and several thousand evacuees requested repatriation to Japan.

One can almost miss some of the subtle, but startling, conclusions in this case. First, the Court falsely concludes that anyone (1) who refused to swear unqualified allegiance to the U.S. and (2) who failed to renounce allegiance to the Japanese Emperor meant that, by definition, they "retained loyalties to Japan." Ponder and see if you agree. Second, remember *Board of Education v. Barnette*? Does "flag salute," "free speech" and religious freedom come to mind? I hope so. ***Barnette* was decided a year prior to this case!**

We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American

citizens. But **hardships are part of war**...All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But **when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.**

The Supreme Court, here, obviously believed the "power to protect must be commensurate with the threatened danger," even if the Constitution had to temporarily take a back seat. One must ask, how much power is commensurate with the threatened danger of **terrorism**? And, 911 was the first such attack upon our mainland!

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers," in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration." And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1 provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have

illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses...

We are all a product of the times in which we live. We may not be able to fully understand the circumstances that existed in 1942, but it would be difficult to imagine that, today, the public at large would ever permit such a mass round up of any ethnic group. Or, would it?

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case...

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid. **It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and**

good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers -- and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies -- we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race.

I had to highlight the prior sentence because it is so blatantly false. Isn't it? If the Court feels the orders were Constitutionally justified, I guess I would rather see them admit the temporary hostility to the Japanese in dire circumstances than to sugarcoat it. I wouldn't call this a "concentration camp" in the sense meant, but neither would I call it anything other than "hostile to the Japanese."

He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot -- by availing ourselves of the calm perspective of hindsight -- now say that at that time these actions were unjustified. *Affirmed.*

CONCURRENCE: Justice Frankfurter...[Quoting from former Chief Justice Hughes,] the war power of the Government is "the power to wage war **successfully.**" *Hirabayashi v. United States.* Therefore, **the validity of action under the war power must be judged wholly in the context of war.**

Right or wrong, these statements would appear to either define "war power" as limitless, yet Constitutional, or as OK in spite of being un-Constitutional. Kick that one around awhile!

That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers...is subject to applicable constitutional limitations." To recognize that military orders are "reasonably expedient military precautions" in time of war and

yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, **I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.**

DISSENT: Justice Roberts...This is not a case of keeping people off the streets at night as was *Hirabayashi v. United States*, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, **it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record,...I need hardly labor the conclusion that Constitutional rights have been violated...**

The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it. But the facts above recited, and those set forth in *Ex parte Endo*, show that the exclusion was but a part of an over-all plan for forcible detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality...I would reverse the judgment..

DISSENT: Justice Murphy...This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity **in the absence of martial law** ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of **racism**.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose

training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, **the military claim must subject itself to the judicial process** of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.

One supposes that if President Bush could show a Justice of Murphy's persuasion that the threat of terrorism is so **"immediate, imminent, and impending as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger,"** then warrantless wiretaps would be upheld. Right?!?!?

Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet **no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law...**

In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshaled in support of such an assumption.

Regardless of correct outcome, don't we have to test Justice Murphy's "false assumption"? He said the "exclusion order necessarily must rely...upon the assumption that **all** persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways" and, then, he says that assumption is false. But, is that the correct assumption upon which the majority relies? If so, is it false? I thought the military was certain that "some" persons of Japanese ancestry were plotting sabotage and that because the only known distinguishing feature of those saboteurs was their race, they saw a need to segregate that race. It appears to me that the Murphy assumption is not false. Indeed, if the military knew or had reason to suspect that "some Japanese" were plotting sabotage, then it would appear that the only thing they could say for certain was that, indeed, "each" person of Japanese descent "may" be a saboteur. Not that all were, but that each "might be." What am I missing? It would appear the assumption was absolutely correct, wouldn't it?

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies...at large today" along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

...Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." They are claimed to be given to "emperor worshiping ceremonies" and to "dual citizenship." Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so." The need for protective custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands." Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, as well as for unidentified radio transmissions and night signaling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of

invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices -- the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. It is asserted merely that the loyalties of this group "were unknown and time was of the essence." Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. **And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.**

Moreover, there was no adequate proof that the FBI and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combating these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved -- or at least for the

70,000 American citizens -- especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent...from this legalization of racism...It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the **heirs of the American experiment** and as entitled to all the rights and freedoms guaranteed by the Constitution.

DISSENT: Justice Jackson...Korematsu was born on our soil of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived...A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth...

Now, if any fundamental assumption underlies our system, it is that **guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."** But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And **it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.**

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. **When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage.**

I am somewhat of a fan of Justice Jackson, primarily due to his honesty. Would we ever want a Commander-in-Chief who failed to meet his paramount consideration to win? Justice Jackson is clearly saying, "Look, it is the duty of the Executive to do everything he can to win. It is our duty to determine the limits of what he can do." Well, that being the case, perhaps it is not all that surprising that Lincoln and FDR and, as you will see soon, Truman, all exceeded constitutional boundaries to WIN. **IF** Bush has, as well (the jury is "out" on the "if" proviso until we complete the journey), Justice Jackson, for one, would not describe any such effort with a rhetoric of disgust. Presidents are supposed to protect Americans and win wars.

Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. **No court can require such a commander in such circumstances to act as a reasonable man**; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

Justice Jackson is honest and candid throughout his dissent.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing...[E]ven if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court...So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. **And thus it will always be when courts try to look into the reasonableness of a military order.**

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain

this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But **once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.** Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States* when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. ...However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. **The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding.** Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

...The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

